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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
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11 NINTENDO OF AMERICA INC., a  
12 Washington corporation,

13 Plaintiff,

14 v.

15 KEVIN NIU, a.k.a. Kui Niu, an  
16 individual, d/b/a www.nxpgame.com,  
www.wiiloveds.com, and  
www.kniu.net; and NXPGAME, INC.,

17 Defendants.  
18

Case No.

COMPLAINT FOR INJUNCTIVE  
RELIEF AND DAMAGES

19 **COMPLAINT**

20 1. This is an action seeking damages, injunctive and other equitable  
21 relief, and attorneys' fees arising out of Defendants' importation of, marketing of,  
22 and trafficking in devices that are designed to circumvent the technological  
23 protection measures built into the enormously popular Nintendo DS and DSi  
24 handheld video game system (the "Nintendo DS"). These devices are marketed and  
25 sold by Defendants under brand names, including, but not limited to, M3 DS Real  
26 Card (with Rumble Pack), DS Linker (8G), R4 DS Revolution, Supercard DS One  
27 SDHC, M3 DS Real Card (with Rumble RAM Pack), EZ-Flash Vi for  
28 DS/DSL/DSi, Gold R4i Revolution SDHC MicroSD/Transflash Adapter Flash Card

1 for NDSi/NDS/DS Lite, Acekard 2, New R4i, DSTTi for DSi, NDS, NDSL, R4 DS,  
2 R4i SDHC, Supercard DS One i, iTouch, iTouch2. Because they are used to play  
3 pirated video games on the Nintendo DS, these devices are colloquially known, and  
4 are collectively referred to herein, as "Game Copiers."

5 2. Defendants' importation, marketing, and sale of Game Copiers, and  
6 use of registered trademarks and copyrights in connection with those actions, has  
7 damaged Plaintiff Nintendo of America Inc. ("NOA"), infringes and threatens  
8 irreparable injury to NOA's intellectual property rights, and violates the Digital  
9 Millennium Copyright Act, 17 U.S.C. § 1201 *et seq.*, the Lanham Act, 15 U.S.C.  
10 § 1051 *et seq.*, and the Copyright Act, 17 U.S.C. § 101 *et seq.*, entitling NOA to the  
11 relief sought herein.

## 12 **THE PARTIES**

13 3. NOA is a Washington corporation headquartered in Redmond,  
14 Washington. NOA is a wholly-owned subsidiary of Nintendo Co. Ltd. ("NCL"), a  
15 Japanese company headquartered in Kyoto, Japan (collectively, NOA and NCL are  
16 referred to herein as "Nintendo"). NOA is responsible for the marketing, sale and  
17 enforcement of Nintendo's intellectual property rights in the Western Hemisphere.  
18 NCL develops and manufactures, and NOA markets and distributes, electronic  
19 video game systems, games, and accessories.

20 4. Defendant Kevin Niu is an individual who, on information and belief,  
21 is also known as Kui Niu. On information and belief, Defendant Niu does business  
22 as [www.nxpgame.com](http://www.nxpgame.com), [www.wiiloveds.com](http://www.wiiloveds.com), and [www.kniu.net](http://www.kniu.net), (hereinafter  
23 referred to as "the Websites"). Through the Websites, Defendant Niu is engaged in  
24 the business of importing, marketing, and trafficking in, among other things, Game  
25 Copiers. Defendant Niu also uses Nintendo's registered trademarks and copyrights  
26 in connection with the Websites. Defendant Niu personally benefits from such  
27 activities and intentionally directs his activities at this District knowing that such  
28 actions will directly harm Washington residents.

1           5. Defendant NXPGAME, Inc. ("NXPGAME") is, on information and  
2 belief, a corporation with an address of 5829 254<sup>th</sup> Street, FL2, Little Neck, New  
3 York, an address associated with Defendant Niu. On information and belief,  
4 NXPGAME is an alter ego of Defendant Niu and [www.nxpgame.com](http://www.nxpgame.com), and  
5 accordingly does business in this District and on the Internet. On information and  
6 belief, NXPGAME is engaged in the business of importing, marketing, and  
7 trafficking in, among other things, Game Copiers.

8           6. Each of the Defendants is responsible for the importation, marketing,  
9 provision, and/or trafficking of Game Copiers in this District.

10          7. Each of the Defendants is an agent of the other.

11          8. Upon information and belief, Defendant Niu does business as  
12 NXPGAME, [www.nxpgame.com](http://www.nxpgame.com); [www.wiiloveds.com](http://www.wiiloveds.com); and [www.kniu.net](http://www.kniu.net). Upon  
13 information and belief Defendant Niu also owns, operates, or otherwise controls  
14 NXPGAME and the Websites, personally participated in or had the right and ability  
15 to direct and control the wrongful conduct alleged in this Complaint, and derived  
16 direct financial benefit from that wrongful conduct.

### 17                           **JURISDICTION AND VENUE**

18          9. The Court has subject matter jurisdiction over the claims alleged  
19 herein pursuant to 28 U.S.C. §§ 1331 (federal question), 1367 (supplemental), and  
20 1338(a) (trademark and copyright), and 1338(b) (related claims of unfair  
21 competition) and 17 U.S.C. §1203 (DMCA).

22          10. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and  
23 1400(a) because a substantial part of the infringing acts occurred in this District due  
24 to the fact that Defendants' contact is directed towards and harms residents of this  
25 District.

26          11. This Court has personal jurisdiction over all Defendants by virtue of  
27 their business transactions in this district and pursuant to RCW 4.28.185.  
28 Defendants have made, and continue to make, the infringing Websites available to

1 countless users within this District; have directed the Websites at residents of this  
2 District; and have sold Game Copiers into this District.

3 **FACTS COMMON TO ALL CLAIMS**

4 **NINTENDO'S INTELLECTUAL PROPERTY AND PRODUCTS**

5 12. Nintendo is a famous brand and Nintendo video game systems (such as  
6 the Nintendo DS, Nintendo DS Lite, Nintendo DSi, Game Boy, and Wii) are well-  
7 known and loved among consumers in the United States and abroad. In addition,  
8 several of the games offered by Nintendo involve its famous Nintendo characters,  
9 including the Mario and Luigi characters that appear in Nintendo's SUPER MARIO  
10 BROS. games. In fact, Nintendo's Mario character has been referred to as one of  
11 the most famous video game characters in history. Nintendo has received a  
12 significant number of copyright registrations covering the Mario, Luigi and Yoshi  
13 characters. Other well-known Nintendo games and characters include Mario Kart,  
14 Pokémon, Donkey Kong, and Zelda.

15 13. The popularity of Nintendo's video game systems, games, and  
16 characters is the result of substantial creative and financial investment in product  
17 development, game development, intellectual property, and marketing. Nintendo  
18 has received many awards for its pioneering contributions to the video game  
19 industry and is an acknowledged leader in the field. Nintendo has earned  
20 tremendous consumer awareness and goodwill through its commitment to  
21 developing innovative, fun, and exciting video game systems and games, and  
22 Nintendo video game systems and games are enjoyed by tens of millions of  
23 consumers in the United States and abroad.

24 14. As part of its business, Nintendo owns the famous and distinctive *Wii*  
25 trademark, used in connection with Nintendo's tremendously successful and popular  
26 video game system. Nintendo and its affiliates presently market and distribute the  
27 Wii video game system, as well as numerous Wii video games and a wide range of  
28 Wii products, ranging from bags and backpacks to clothing to chewing gum. The

1 *Wii* trademark and *Wii* products have been widely advertised and extensively  
2 offered throughout the United States (and worldwide). The *Wii* trademark has  
3 become famous through widespread and favorable public acceptance and  
4 recognition and is an asset of substantial value to Nintendo.

5 15. Nintendo is the owner of numerous registrations in the United States  
6 for the *Wii* mark and other marks incorporating *Wii*. These trademark registrations  
7 are in full force and effect and are owned by Nintendo. Nintendo also holds  
8 trademark registrations for the *Wii* mark in numerous other countries, including  
9 Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador,  
10 European Union, Jamaica, Japan, Mexico, Panama, Peru and Venezuela.

11 16. In addition, Nintendo has registered and actively uses domain names  
12 that incorporate its famous *Wii* trademark. Nintendo and/or its affiliates use these  
13 domain names for such purposes as marketing, operating fan websites that provide  
14 information about *Wii* news, games, and products to its consumers. *Wii.com*,  
15 which is owned by Nintendo, is the location of Nintendo's primary *Wii* Website.  
16 The Website has been active as the site for Nintendo's *Wii* products and services  
17 since at least as early as January 6, 2007.

18 17. Nintendo has made substantial investments in the development,  
19 marketing, and promotion of its innovative products. Nintendo has acquired  
20 intellectual property and authorizes licensees who create and publish many popular  
21 video games specifically and exclusively for play on Nintendo video game systems  
22 (collectively, software games created by Nintendo and its authorized licensees for  
23 the Nintendo DS are referred to herein as "Nintendo DS Games"). Nintendo DS  
24 Games can take years and millions of dollars to develop.

25 18. NOA holds copyright and trademark rights in and to various Nintendo  
26 DS Games, Nintendo video game systems and video game characters, including,  
27 without limitation, those listed at Exhibits A and attached as Exhibits B and C.  
28

1           19. Among Nintendo's video game systems is the enormously popular  
2 Nintendo DS, a proprietary dual-screen handheld portable video game system  
3 featuring a clamshell design with two LCD screens inside, the bottom one a  
4 touchscreen. The original version, the Nintendo DS, was released in the United  
5 States in 2004. The Nintendo DS Lite (*see* fig. 1), a slimmer, brighter, and more  
6 lightweight version of the Nintendo DS, was released in the U.S. in June 2006. The  
7 latest version, the Nintendo DSi, was released in the U.S. in April 2009. The  
8 Nintendo DSi adds multimedia features, cameras, and other enhancements. The  
9 Nintendo DS family of systems has enjoyed immense popularity.

10  
11 **Fig. 1**



19           20. A user plays a video game on the Nintendo DS by inserting an  
20 authorized game cartridge (referred to herein as “Nintendo DS Game Card”) into  
21 the Nintendo DS for game play. NOA does not authorize and has never authorized  
22 the copying or downloading of Nintendo Games onto devices, such as Game  
23 Copiers, that mimic authorized Nintendo DS Game Cards and bypass the protection  
24 measures that protect the Nintendo DS. NOA does not authorize and has never  
25 authorized Nintendo DS Games to be copied onto personal computers or to be  
26 downloaded from personal computers to devices like Game Copiers.  
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**NINTENDO'S EFFORTS TO PROTECT**  
**ITS INTELLECTUAL PROPERTY RIGHTS**

21. The popularity of the Nintendo DS has made Nintendo the target of intellectual property pirates, who benefit from Nintendo's innovation and investment by making unauthorized copies of Nintendo DS Games, or by creating (and profiting from) the means by which others can play pirated copies of Nintendo DS Games on a Nintendo DS. Game Copiers are the most popular means for playing pirated games on the Nintendo DS.

22. Illegal copying of video game software is an international problem of enormous proportions and great financial consequence for Nintendo. Nintendo has taken many steps to halt the illegal copying, marketing, sale, and distribution of Nintendo DS Games.

23. Nintendo's efforts have included registration of the intellectual property rights in and to its video game systems and software. In addition, Nintendo protects and enforces its rights through legal actions brought around the world to stop individuals and companies from trafficking in Game Copiers. In fact, United States Customs has already determined that similar products that circumvent Nintendo's technical protection measures are violations of 17 U.S.C. § 1201.

24. Nintendo also employs a number of measures to protect and control access to its copyrighted works. As to the Nintendo DS, these include both design-based and technological measures. Nintendo designed the Nintendo DS so that it will play only game cards that have a particular shape, with unique external geometry and electrical connections. Nintendo also built technological protection measures into the Nintendo DS. These technological measures implement a process by which commands and data are exchanged between the Nintendo DS and the game card that is inserted into the Nintendo DS for play. Multiple copyrighted programs are repeatedly accessed and copied during the operation of the Nintendo DS protection system and the game play that occurs if the protection measures are



1 passed. The technological measures of the Nintendo DS ensure that even if a user  
2 inserts into the Nintendo DS a game card that fits perfectly into the uniquely-shaped  
3 Nintendo DS card slot, unless the game card also has the software necessary to pass  
4 (or to circumvent) the Nintendo DS technological protection measures, the game  
5 card cannot be played on the Nintendo DS.

### 6 **DEFENDANTS' INFRINGING ACTIVITIES**

7 25. Defendants, in particular the Websites, display Nintendo's registered  
8 trademarks and copyrights. In addition, the website www.wiiloveds.com  
9 incorporates Nintendo's famous *Wii* trademark in the URL. Defendants'  
10 www.wiiloveds.com website states that all trademarks, service marks and trade  
11 names appearing on the website are "trademarks or registered trademarks of  
12 www.wiiloveds.com."

13 26. Defendants presently market, sell and traffic in, and on information  
14 and belief also import, Game Copiers.

15 27. The Game Copiers that are imported, marketed, sold, and trafficked in  
16 by Defendants enable those who use them to download games to portable memory  
17 storage devices and to circumvent the technological measures employed by  
18 Nintendo to control access to its copyrighted works and to protect its rights as a  
19 copyright owner.

20 28. Game Copiers employ a number of components, including (1) a game  
21 card (referred to herein as the "Game Copier Card") that is substantially the same  
22 shape, and has substantially the same electrical connection configuration, as  
23 Nintendo's proprietary Nintendo DS Game Cards, so that a Game Copier Card fits  
24 perfectly in the Nintendo DS and resembles an authorized Nintendo DS game card;  
25 and (2) a portable memory device (or instructions to purchase one) that can hold  
26 multiple pirated Nintendo DS Games and that is inserted into the Game Copier  
27 Card for game play. Defendants sell Game Copiers that have unauthorized copies  
28 of Nintendo data that is necessary to bypass Nintendo's technological protection



1 measures already installed or, where such data is not pre-installed, Defendants  
2 direct their customers to the Websites, in particular [www.nxpgame.com](http://www.nxpgame.com) and  
3 [www.kniu.net](http://www.kniu.net), or third party websites, to download to the Game Copier Card  
4 unauthorized copies of Nintendo data that is necessary to bypass Nintendo's  
5 technological protection measures.

6 29. When Game Copiers are used as Defendants instruct, and as required  
7 by the products they traffic in, they bypass Nintendo's technological protection  
8 measures and gain the same access to the Nintendo DS, and to certain of NOA's  
9 copyrighted programs, as an authorized Nintendo DS Game Card would have.

10 30. Game Copier cards are specifically designed to accommodate portable  
11 memory devices that hold enormous amounts of data. Consequently, hundreds of  
12 pirated games may be downloaded onto just one Game Copier card, which then  
13 allows the user to play any of these pirated games on a Nintendo DS.

14 31. When Game Copiers are used as instructed by Defendants, and as  
15 required by the products they traffic in, they will cause the following federally  
16 registered NINTENDO logo to appear on the screen of a DS system:



19 32. Defendants' display of this trademarked logo is without NOA's  
20 authorization or consent, and it implies and confuses consumers into believing that  
21 there is some sponsorship, affiliation, or endorsement by Nintendo.

22 33. Nintendo has never authorized any Game Copiers, and the Game  
23 Copiers at issue in this case were not authorized by Nintendo or on its behalf.

24 34. Defendants are well aware of Nintendo's rights, the extent of the  
25 problem of piracy, and Nintendo's enforcement efforts. Nintendo, through its  
26 counsel, repeatedly contacted Defendant Niu regarding his infringing activities and  
27 requesting him to cease all such actions.  
28

1           35. The first contact was on June 1, 2009. Defendant Niu replied on June  
2 8, 2009 stating that he would stop selling Game Copiers. As of June 10, 2009,  
3 Nintendo's counsel confirmed that the illegal products had been removed from  
4 www.nxpgame.com.

5           36. On June 22, 2009 Defendant Niu resumed selling Game Copiers on  
6 www.nxpgame.com. On July 6, 2009, Nintendo's counsel sent another letter to  
7 Defendant Niu informing him of his continued infringement of Nintendo's  
8 intellectual property and again demanded that he cease and desist all further sales  
9 and marketing of Game Copiers by July 9, 2009.

10           37. Continued monitoring of the Defendant's website showed that on  
11 August 13, 2009 Game Copiers were still offered for sale but that purchase ability  
12 was disabled on www.nxpgame.com. From August 18, 2009 through August 31,  
13 2009, the Defendant offered products again on www.nxpgame.com.

14           38. On September 1, 2009, Nintendo's counsel sent a fourth demand letter  
15 to Defendant Niu. On September 2, 2009, Nintendo's counsel received a phone call  
16 from Defendant Niu's attorney advising that Defendant Niu would be pulling all  
17 products from his websites. On September 18, 2009 the URL for  
18 www.nxpgame.com was active but "business closed" was displayed on the site.

19           39. On November 9, 2009, www.nxpgame.com displayed a coupon for  
20 10% off at www.wiiloveds.com: "get 10% off with coupon at nxpgame10." As of  
21 November 12, 2009, www.nxpgame.com was directing its consumers to  
22 www.wiiloveds.com. As of March 16, 2010, www.nxpgame.com was redirecting  
23 users to www.wiiloveds.com.

24           40. On information and belief, Defendants have derived significant profit  
25 and financial benefit from their involvement in the importation of, marketing of,  
26 and trafficking in Game Copiers. Defendants knew or should have known that  
27 Game Copiers infringed Nintendo's intellectual property rights, and their  
28 infringement of those rights has been willful and deliberate.

**CAUSES OF ACTION**

**FIRST CLAIM**

**VIOLATION OF THE DIGITAL MILLENNIUM COPYRIGHT ACT**

**(17 U.S.C. § 1201 *et. seq.*)**

41. NOA realleges and incorporates by reference paragraphs 1-40.

42. Defendants were and are actively engaged in the business of marketing, importing, offering to the public, providing, or otherwise trafficking in Game Copiers. Game Copiers are used, by Defendants and others, to circumvent the technological measures that effectively control access to NOA's copyrighted works and protect NOA's rights as a copyright owner.

43. Game Copiers (a) are primarily designed or produced for the purpose of circumventing technological measures that effectively control access to works protected by NOA's copyright, or that effectively protect NOA's rights as a copyright owner; (b) have only limited commercially significant purpose or use other than to circumvent such technological measures; or (c) are marketed by Defendants, acting alone or in concert with others, for use in circumventing such technological measures, in violation of 17 U.S.C. §§ 1201(a)(1), 1201(a)(2), and 1201(b).

44. NOA holds valid copyrights, duly and properly registered with the United States Copyright Office, including those identified at Exhibit B. True and correct copies of the Registration Certificates for these copyrights are attached at Exhibit C. The technological measures employed by Nintendo were intended to control access to and to protect NOA's rights to these copyrights.

45. Defendants knew or had reason to know the purpose and use of the Game Copiers that they marketed, imported, offered to the public, provided, or otherwise trafficked in. Defendants' actions were willful, and were taken for their own commercial advantage or private financial gain. Defendants knew or should

1 have known that offering to the public, providing, and trafficking in Game Copiers  
2 was unlawful.

3 46. Defendants' violations have injured and will continue to injure NOA.  
4 NOA is entitled to recover its actual damages and Defendants' profits resulting from  
5 Defendants' wrongful conduct, pursuant to 17 U.S.C. § 1203(c)(2). Alternatively,  
6 NOA is entitled to statutory damages pursuant to 17 U.S.C. § 1203(c)(3).

7 47. NOA also is entitled to injunctive relief pursuant to 17 U.S.C.  
8 § 1203(b)(1) and to an Order impounding any materials involved in Defendants'  
9 violation of the Digital Millennium Copyright Act pursuant to 17 U.S.C.  
10 § 1203(b)(3).

11 48. Defendants' wrongful conduct has caused and will continue to cause  
12 NOA irreparable harm, and NOA has no adequate remedy at law to redress any  
13 continued violations. Unless restrained by this Court, Defendants will continue to  
14 violate the Digital Millennium Copyright Act.

15 49. NOA also is entitled to recover its attorneys' fees and costs of suit  
16 pursuant to 17 U.S.C. § 1203.

## 17 **SECOND CLAIM**

### 18 **DIRECT COPYRIGHT INFRINGEMENT**

#### 19 **(Violations of 17 U.S.C. § 106 *et seq.*)**

20 50. NOA realleges and incorporates by reference paragraphs 1-49.

21 51. NOA owns numerous copyright registrations related to the Nintendo  
22 characters, including, without limitation, those identified at Exhibit B. These  
23 copyright registrations, attached at Exhibit C, are in full force and effect and are  
24 enforceable by NOA.

25 52. In connection with their sale, marketing and distribution of Game  
26 Copiers, Defendants use NOA's copyrighted characters, including, but not limited  
27 to Mario, Luigi and Yoshi, throughout the [www.wiilovedds.com](http://www.wiilovedds.com) website to  
28

1 promote their business of selling Game Copiers, thereby infringing NOA's  
2 copyrights.

3 53. The foregoing acts of Defendants constitute the direct infringement in  
4 violation of Nintendo's exclusive rights in its copyrighted works under 17 U.S.C.  
5 § 106.

6 54. Defendants' actions thus constitute direct infringement of Nintendo's  
7 copyrights in violation of 17 U.S.C. § 501.

8 55. Defendants knew or should have known of Nintendo's exclusive rights  
9 under the copyright laws of the United States. Defendants' acts in violation of  
10 Nintendo's rights have been willful and deliberate and have resulted in damage to  
11 Nintendo in an amount to be proved at trial.

### 12 **THIRD CLAIM**

#### 13 **CONTRIBUTORY AND VICARIOUS COPYRIGHT INFRINGEMENT**

#### 14 **(Violations of 17 U.S.C. § 106 *et seq.*)**

15 56. NOA realleges and incorporates by reference paragraphs 1-55.

16 57. NOA owns numerous copyright registrations related to the Nintendo  
17 Games, including, without limitation, those identified at Exhibit B. These  
18 copyright registrations, attached at Exhibit C, are in full force and effect and are  
19 enforceable by NOA.

20 58. In connection with their sale, marketing and distribution of Game  
21 Copiers, Defendants instruct users how to download material from the Internet,  
22 including directing users to third party websites to download pirated Nintendo  
23 Games, load the material into Game Copiers, and play the material on a Nintendo  
24 DS. Game Copiers are used with portable memory devices that allow multiple  
25 games to be loaded and played on a single Game Copier. Defendants distribute  
26 Game Copiers with the object of promoting their use to infringe NOA's copyrights.

27 59. The foregoing acts of Defendants constitute the vicarious or  
28 contributory reproduction, preparation of derivative works, distribution, and

1 inducement of same, in violation of Nintendo's exclusive rights in its copyrighted  
2 works under 17 U.S.C. § 106.

3 60. Defendants' actions thus constitute actual and threatened vicarious  
4 infringement, contributory infringement, and inducement of infringement of  
5 Nintendo's copyrights in violation of 17 U.S.C. § 501.

6 61. Defendants knew or should have known of Nintendo's exclusive rights  
7 under the copyright laws of the United States, of their inducement and aid in the  
8 accomplishment of infringement by others. Defendants' acts in violation of  
9 Nintendo's rights have been willful and deliberate and have resulted in damage to  
10 Nintendo in an amount to be proved at trial.

#### 11 **FOURTH CLAIM**

#### 12 **TRADEMARK INFRINGEMENT**

#### 13 **(Violations of the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a))**

14 62. NOA realleges and incorporates by reference paragraphs 1-61.

15 63. NOA owns federal registrations for the trademarks identified at  
16 Exhibit A. These registrations are in full force and effect and are enforceable.

17 64. In connection with their sale, marketing and distribution of Game  
18 Copiers, Defendants use NOA's trademarks throughout the Websites to promote  
19 their business of selling Game Copiers, including the use of Nintendo's famous *Wii*  
20 trademark in the URL [www.wiiloveds.com](http://www.wiiloveds.com), thereby infringing NOA's trademarks.

21 65. When a Game Copier is used as directed by Defendants, it will cause  
22 Nintendo's federally registered logo to appear on the screen of the Nintendo DS:



25 66. Defendants' actions constitute use in interstate commerce of a false  
26 designation of origin, false or misleading description of fact, or false or misleading  
27 representation of fact that is likely to cause confusion or mistake, or to deceive as to  
28 the affiliation, connection, or association of the goods and services with Nintendo,

1 or as to the origin, sponsorship, or approval of the goods and services provided by  
2 Defendants in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

3 67. Defendants' actions also constitute the making or use in interstate  
4 commerce of a reproduction, counterfeit, copy, or colorable imitation of a  
5 registered trademark of NOA in connection with the sale, offering for sale,  
6 distribution, or advertising of goods or services on or in connection with which  
7 such use is likely to cause confusion or mistake, or to deceive, in violation of  
8 section 32 of the Lanham Act, 15 U.S.C. § 1114.

9 68. Defendants knew or should have known of NOA's rights, and  
10 Defendants' infringement has been knowing, willful, and deliberate, making this an  
11 exceptional case within the meaning of 15 U.S.C. § 1117.

12 69. The infringing acts alleged above have a foreseeable effect on U.S.  
13 commerce.

14 70. NOA has been and continues to be damaged by Defendants' wrongful  
15 acts in a manner that cannot be fully measured or compensated in economic terms,  
16 and NOA has no adequate remedy at law. Defendants' acts have damaged, and  
17 threaten to continue to damage, NOA's reputation and goodwill.

18 71. Defendants' infringement will continue unless enjoined by the Court.

19 72. The interests of and links to U.S. commerce are strong in relation to  
20 those of other nations given that, among other things, enforcement of NOA's rights  
21 under the Lanham Act does not conflict with, but rather supports, the interests of  
22 other countries in enforcing Nintendo's similar rights under the laws of those  
23 countries, and the significance of Defendants' illegal acts is greatest in the United  
24 States because NOA is a U.S. corporation with a general sales territory in the  
25 Western Hemisphere, including the United States.



**FIFTH CLAIM**

**UNFAIR COMPETITION**

**(RCW 19.86 *et seq.*)**

73. NOA realleges and incorporates by reference paragraphs 1-72.

74. The acts of Defendants complained of herein constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade commerce within the meaning of section 19.86 *et seq.* of the Revised Code of Washington.

75. Defendants' acts have been willful and persistent and have occurred over the course of several years, since at least 2007. As a direct and proximate result of Defendants' violations of Revised Code of Washington section 19.86 *et seq.*, NOA has suffered and will continue to suffer both damages and irreparable harm for which NOA has no adequate remedy at law. Unless enjoined, Defendants will commit further violations.

**JURY DEMAND**

NOA demands a trial by jury of all issues so triable.

**PRAYER FOR RELIEF**

NOA seeks the following relief:

1. An award of compensatory damages, including consequential and incidental damages, in an amount to be proved at trial.
2. An award of statutory damages as allowed by law, in an amount up to \$150,000 for infringement of each Nintendo copyrighted work, up to \$2,000,000 for infringement of each Nintendo trademark, and up to \$2,500 for each violation of 17 U.S.C. § 1201.
3. An award of enhanced damages or profits, whichever is proved greater, pursuant to section 35 of the Lanham Act, 15 U.S.C. § 1117, and as otherwise provided by law.
4. An award of attorneys' fees and costs.

1           5.     An award of prejudgment and postjudgment interest at the maximum  
2 rate allowed by law.

3           6.     An accounting of all Game Copiers that were or are within Defendants'  
4 possession, custody or control.

5           7.     An accounting and an award to NOA of Defendants' profits, gains, or  
6 unjust enrichment in an amount to be proved at trial.

7           8.     An accounting of all Defendants' receipts and disbursements, profit  
8 and loss statements, and other financial materials, statements, and books relating to  
9 Defendants' importation, distribution, marketing or sale of any Game Copier.

10          9.     A preliminary and permanent injunction pursuant to 17 U.S.C. §§ 1203  
11 and 502, and 15 U.S.C. § 1116, enjoining Defendants, their agents, servants, and  
12 employees, and all those in active concert or participation with Defendants, from:

13           a)     importing, manufacturing, offering to the public, providing, using or  
14 otherwise trafficking in any technology, product, service, device,  
15 component or part thereof (including Game Copiers), that is primarily  
16 designed or produced to circumvent a technological measure that  
17 effectively protects NOA's rights as a copyright owner, or controls  
18 access to any work to which NOA holds a registered copyright;

19           b)     importing, manufacturing, offering to the public, providing, using or  
20 otherwise trafficking in any technology, product, service, device,  
21 component or part thereof (including Game Copiers), that has only  
22 limited commercially significant purpose or use other than to  
23 circumvent a technological measure that effectively protects NOA's  
24 rights as a copyright owner, or controls access to any work to which  
25 NOA holds a registered copyright;

26           c)     importing, manufacturing, offering to the public, providing, using or  
27 otherwise trafficking in any technology, product, service, device,  
28 component or part thereof (including Game Copiers), that is marketed

1 by Defendants or others acting in concert with them for use in  
2 circumventing a technological measure that effectively protects NOA's  
3 rights as a copyright owner, or controls access to any work to which  
4 NOA holds a registered copyright;

- 5 d) using, or inducing or enabling others to use, any reproduction,  
6 counterfeit, copy, or colorable imitation of NOA's trademarks,  
7 including those identified at Exhibit A, in any manner in connection  
8 with the manufacture, printing, distribution, advertising, offering for  
9 sale or sale of any goods or merchandise, including the use of  
10 Nintendo's trademarks in connection with a website;
- 11 e) using, or inducing or enabling others to use, NOA's trademarks,  
12 including those identified at Exhibit A, or any reproduction,  
13 counterfeit, copy, or colorable imitation of said marks in any manner  
14 likely to cause others falsely to believe that Defendants' products are  
15 connected with Nintendo or legitimate Nintendo products bearing  
16 NOA's trademarks when they are not, including the use of Nintendo's  
17 trademarks in connection with a website;
- 18 f) using, or inducing or enabling others to use, any reproduction,  
19 counterfeit, copy, or colorable imitation of NOA's copyrights,  
20 including those identified at Exhibits B and C, in any manner in  
21 connection with the manufacture, printing, distribution, advertising,  
22 offering for sale or sale of any goods or merchandise, including the use  
23 of Nintendo's copyrights in connection with a website;
- 24 g) copying, distributing, or otherwise using any portion of NOA's  
25 copyrighted software code, or any derivative thereof, in any manner in  
26 the manufacture, assembly, distribution, advertisement, promotion,  
27 offering for sale, or sale of goods or merchandise;  
28

- 1 h) selling, distributing, lending, publicly performing or playing any
- 2 unauthorized copy of any NOA copyrighted work;
- 3 i) importing, exporting, shipping, delivering, distributing, transferring,
- 4 returning, holding for sale, destroying, or otherwise moving, storing or
- 5 disposing of any Game Copiers or any other item or product bearing or
- 6 used to reproduce any unauthorized reproduction, counterfeit, copy or
- 7 colorable imitation of NOA's trademarks and/or NOA's copyrights;
- 8 j) destroying, transferring, altering, moving, returning, concealing, or in
- 9 any manner secreting any and all Game Copiers, and any and all
- 10 Documents and records, including without limitation computer tapes,
- 11 computer disks, business records, emails, supplier names and
- 12 addresses, shipment records, books of accounts, receipts,
- 13 specifications, packaging and containers, and other documentation
- 14 relating or referring in any way to the importation, manufacturing,
- 15 offering to the public, providing, using, or otherwise trafficking in
- 16 Game Copiers.
- 17 k) marketing, selling, importing, supplying or otherwise providing any
- 18 product, device, or component thereof that contributes to or induces the
- 19 copying of NOA's copyrighted software; and
- 20 l) unfairly competing with Nintendo.

21 10. Preliminary and permanent injunctive relief, such as may later be  
22 requested before or at trial, requiring Defendants and all persons or entities in active  
23 concert or participation with Defendants, immediately to:

- 24 a) identify every supplier to each Defendant of every Game Copier; and
- 25 b) take steps to ensure that all Game Copiers in any Defendant's
- 26 possession, custody, or control or that are in shipment to any
- 27 Defendant are immediately seized, inspected, and delivered into NOA's
- 28 possession.

